ATTORNEY FOR APPELLANT:

MICHAEL A. DORELLI
Hoover Hull LLP
Indianapolis, Indiana

ATTORNEY FOR APPELLEE

MERLE B. ROSE
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

GUY WEBB d/b/a ALL STAR MERCHANDISE; GUY WEBB, personally; ALL STAR MERCHANDISE, INC.; WEBB RACING, INC.; WEBB RACING, INC. d/b/a ALL STAR MERCHANDISE, INC.,	)	
Appellants-Plaintiffs,	)	
vs.	)	No. 49A02-0602-CV-95
ARIZONA SPORT SHIRTS, INC.,	)	
Appellee-Defendant.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Cale J. Bradford, Judge
Cause No. 49D01-0409-CC-001668

October 5, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary[1]

Guy Webb d/b/a All Star Merchandise, Guy Webb personally, All Star Merchandise, Inc., Webb Racing, Inc., and Webb Racing, Inc. d/b/a All Star Merchandise, Inc. ("Appellants") appeal the trial court's grant of summary judgment in favor of the plaintiff, Arizona Sport Shirts, Inc. ("Arizona"), on Arizona's claim for an account stated. We conclude that the trial court did not err in denying Appellants' motion to dismiss Arizona's First Amended Complaint, did not abuse its discretion in denying Appellants' request for a second extension of time in which to respond to Arizona's motion for summary judgment, and properly granted summary judgment in favor of Arizona as to all Appellants except Guy Webb personally. Therefore, we reverse the trial court's grant of summary judgment against Guy Webb and direct the trial court to enter judgment in his favor, but we affirm the trial court's grant of summary judgment in favor of Arizona against all other Appellants.

Facts and Procedural History

Arizona is an Indiana corporation that sells apparel, promotional items, and other goods and services. Arizona began receiving orders for merchandise from All Star Merchandise, Inc. in May 2000. All Star Merchandise, Inc. generally paid all or part of

[1] We are disturbed by the parties' repeated use of acrimonious, argumentative language in their briefs on appeal. Appellants refer to "the tactics employed by Arizona to further confuse the status of the matter," Appellants' Br. p. 28, and claim that the trial court "ambushed" them, *id*. In their reply brief, Appellants allege that Appellee is "hoping to 'slip one by' this Court," Appellants' Reply Br. p. 1, that Appellee has responded to Appellants' arguments in a "reckless manner," *id*., that Appellee "duped the Trial Court," *id*. at 2, and that Appellee is "attempt[ing] to mislead this Court," *id*. at 7. In its own brief, Appellee accuses Appellants of making "snide comments," Appellee's Br. p. 10, and wanting to "chastise" the trial court, *id*. at 12. As another panel of this Court recently stated, "[s]uch vitriol is inappropriate and not appreciated by this court, nor does it constitute effective appellate advocacy." *Hoosier Outdoor Advertising Corp. v. RBL Mgmt., Inc.*, 844 N.E.2d 157, 162 (Ind. Ct. App. 2006), *trans. pending*.

its monthly bills by check. Eventually, however, All Star Merchandise, Inc.'s unpaid balance consistently remained above $15,000.00. On August 24, 2004, Arizona sent to All Star Merchandise, Inc. a copy of its Customer History Report ("All Star Merchandise, Inc.'s statement") and demanded that it pay off its balance of $27,217.10. Over the next two weeks, Arizona received no payments or complaints that merchandise was unacceptable, and All Star Merchandise, Inc. never returned any merchandise.

On September 9, 2004, Arizona filed a complaint, naming as defendants Guy Webb ("Webb") d/b/a All Star Merchandising, Webb personally, and All Star Merchandise, Inc. At all times relevant to this suit, Webb was "an employee or owner of All Star Merchandise, Inc., and he ha[d] the authority to bind the corporation, and to communicate on behalf of the corporation, within the scope of his employment or ownership interest[.]" Appellants' App. p. 35. In the complaint, Arizona alleged that despite repeated demands for payment, All Star Merchandise, Inc.'s balance "remain[ed] due and owing[,]" and that "no objections on said account have been received by [Arizona]." *Id*. at 14. Attached to the complaint was an exhibit consisting of pages 4-11 of All Star Merchandise, Inc.'s statement, which listed "All Star Sprint Merchandise" as the customer. Twenty days later, on September 29, 2004, Appellants' counsel sent a letter to Arizona's counsel, stating "Please consider this correspondence my clients' objection to any amount allegedly owed to your client as indicated in the August invoice or otherwise." *Id*. at 104. Appellants' counsel also wrote, "your client had absolutely no basis for naming Mr. Webb as an individual, personal defendant in this matter." *Id*. at 105.

Through discovery, Arizona learned that All Star Merchandise, Inc. was an assumed business name of Webb Racing, Inc., a corporation of which Webb was the chief executive officer. Therefore, Arizona filed an Amended Complaint ("First Amended Complaint"), with permission from the trial court, for the purpose of adding Webb Racing, Inc. and Webb Racing, Inc. d/b/a All Star Merchandise, Inc. as defendants. On May 18, 2005, Arizona filed its Motion for Summary Judgment. Attached to the motion was the affidavit of Karl Korbacher ("Korbacher"), Arizona's president and chief executive officer, and attached to the affidavit was an exhibit consisting of pages 1-11 of All Star Merchandise, Inc.'s statement. The first page of the statement listed Dan Lange in Camargo, Illinois, as the contact person for All Star Merchandise, Inc. Webb's name was not on the statement. On May 20, 2005, the trial court set Arizona's motion for summary judgment for a hearing on August 10, 2005.

Arizona then filed its Second Amended Complaint, with permission from the trial court, adding Guy Webb d/b/a All Star Circuit of Champions and All Star Circuit of Champions, Inc. as defendants.[2] Arizona attached All Star Merchandise, Inc.'s statement in its entirety. On June 3, 2005, Appellants, unaware that the trial court had already granted Arizona permission to file its Second Amended Complaint, *see* Appellants' App. p. 129, moved to dismiss Arizona's First Amended Complaint. Appellants argued that Arizona (1) failed to state a claim for an account stated and (2) had no basis for naming Webb, individually, as a defendant. The same day, Appellants filed their Motion for Two Week Enlargement of Time to Respond to Plaintiff's Motion for Summary Judgment,

[2] The relationship between Appellants and the added defendants is not completely clear, and as we explain below, Arizona eventually dismissed its claims against Guy Webb d/b/a All Star Circuit of Champions and All Star Circuit of Champions, Inc.

stating, in part, that depending upon the resolution of their motion to dismiss Arizona's First Amended Complaint, a response to Arizona's motion for summary judgment might not be required. As such, Appellants asked the trial court for two weeks from the date of the court's ruling on their motion to dismiss within which they could respond to Arizona's motion for summary judgment if necessary. The trial court eventually entered an order that gave Appellants until July 25, 2005, to respond to Arizona's motion for summary judgment.[3]

The trial court notified the parties that Appellants' motion to dismiss was going to be heard at the same hearing as Arizona's motion for summary judgment on August 10, 2005. Appellants then filed a document captioned "Reply in Support of Motion to Dismiss and/or for Summary Judgment," contending that their motion to dismiss Arizona's First Amended Complaint was equally applicable to Arizona's Second Amended Complaint and stating, "The Second Amended Complaint should be dismissed

[3] The trial court's "Order Granting Enlargement of Time" appears in the Appellants' Appendix as follows:

> Defendants, by counsel, having filed their Motion for Enlargement of Time, and the Court having reviewed said Motion, and being otherwise duly advised, now GRANTS the Motion and ORDERS that Defendants shall file their response to Plaintiff's Motion for Summary Judgment on or before fourteen (14) ~~days following the date of this Court's ruling on Plaintiff's Motion for Leave to File Second Amended Complaint and its ruling on Defendants' Motion to Dismiss, whichever date is later~~.

Appellants' App. p. 135. We have no indication in the record before us why the final lines of the order were struck through. The Chronological Case Summary entry corresponding to the trial court's order states: "Order enlarging time to and including 7-14-05." *Id*. at 6. However, in another filing made on July 21, 2005, Appellants suggested that their response to Arizona's motion for summary judgment was due "three (3) business days" after July 20, 2005 (July 25, 2005, according to our calculations). *Id*. at 161; *see also* Appellants' Br. p. 5 n.2 ("Apparently, the Trial Court entered an Order allowing the Webb Defendants an additional two weeks, through July 25, 2005, to respond to Arizona's summary judgment motion[.]"). Arizona agrees that the trial court gave Appellants until July 25, 2005, to respond to Arizona's motion for summary judgment. Appellee's Br. p. 2.

in its entirety[.]" Appellants' App. p. 129-30. Appellants also moved to dismiss Arizona's Second Amended Complaint, incorporating by reference their previously filed Motion to Dismiss and Reply in Support of Motion to Dismiss.

On July 20, 2005, Arizona again filed a motion for leave to amend its complaint (its third), stating that "discovery has indicated that the issues in this matter need to be more defined rather than just a general Complaint." *Id*. at 141. Arizona sought to add two counts not included in their previous complaints, including a claim for unjust enrichment. In response, on July 21, 2005, Appellants filed with the trial court their Motion to Vacate Hearing on Plaintiff's Motion for Summary Judgment. Appellants alleged:

> 3. [Arizona's] Third Amended Complaint supersedes its two prior Complaints, and as a result, renders its Motion for Summary Judgment and the Defendants' Motion to Dismiss, both relating to the First Amended Complaint, moot.
>
> 4. Therefore, the hearing – scheduled for August 10, 2005 – on the Motion for Summary Judgment and the Motion to Dismiss, should be vacated.

Id. at 161. On July 27, 2005, the trial court sent notice to the parties that it would hold a hearing on Appellants' motion to vacate on August 10, 2005, the same day of the hearing on Arizona's motion for summary judgment.

Notwithstanding its earlier notice to the parties, on August 4, 2005, the trial court entered an order denying Appellants' motion to vacate the summary judgment hearing. However, this order was never distributed to the parties. The next day, August 5, 2005, Appellants filed their Motion to Clarify Status of Summary Judgment Motion. Essentially, Appellants asked the trial court whether Arizona's summary judgment

motion was still viable in light of the fact that Arizona amended its complaint after filing its motion for summary judgment and was again seeking to amend the complaint. Appellants also stated:

> If the Court determines that the Summary Judgment Motion remains valid despite the subsequent filings by the Plaintiff, the Defendants request an extension of two (2) weeks from the date of the Court's clarification Order, within which to file their Response and Cross-Motion for Summary Judgment.

Id. at 185. The trial court never ruled on the motion for clarification, and Appellants never filed a response to Arizona's motion for summary judgment.

The parties appeared at the courthouse by counsel as scheduled on August 10, 2005, and met in chambers with the trial judge. The trial judge entered orders denying Appellants' motions to dismiss, denying the defendants' request for an extension of time in which to respond to Arizona's motion for summary judgment, and granting Arizona's motion for summary judgment against Guy Webb d/b/a All Star Merchandise, Guy Webb personally, All Star Merchandise, Webb Racing, Inc., and Webb Racing, Inc. d/b/a All Star Merchandise, Inc.[4] A Chronological Case Summary ("CCS") entry for August 10, 2005, states that the case was "disposed by default judgment." *Id*. at 8.

Appellants then filed a Motion to Reconsider, which the trial court denied. The trial court also allowed Arizona to withdraw its third motion for leave to amend its complaint. Next, Arizona filed a Motion to Dismiss, asking the trial court to dismiss its claims against Guy Webb d/b/a All Star Circuit of Champions, Inc. and All Star Circuit

[4] The record does not contain a typewritten order granting summary judgment in favor of Arizona. Rather, details of the court's orders are found in its handwritten Minutes of the Court from August 10, 2005, and the Chronological Case Summary. Defendants Guy Webb d/b/a All Star Circuit of Champions and All Star Circuit of Champions, Inc. were not mentioned in the trial court's orders.

of Champions, Inc. The trial court entered final judgment in favor of Arizona and granted Arizona's motion to dismiss its cause of action against Guy Webb d/b/a All Star Circuit of Champions, Inc. and All Star Circuit of Champions, Inc. with prejudice. Appellants now appeal.

Discussion and Decision

On appeal, Appellants argue that the trial court erred in denying their motion to dismiss Arizona's First Amended Complaint, abused its discretion in denying their request for an extension of time in which to respond to Arizona's motion for summary judgment, and erred in granting summary judgment in favor of Arizona on its claim for an account stated. We address each issue in turn.

I. Motion to Dismiss

Appellants contend that the trial court erred in denying their motion to dismiss Arizona's First Amended Complaint because the complaint "failed to establish the elements necessary to sustain a claim under [an] 'account stated' theory." Appellants' Br. p. 19. We cannot agree.

The standard of review of a trial court's denial of a Trial Rule 12(B)(6) motion to dismiss for failure to state a claim is *de novo*. *Cripe, Inc. v. Clark*, 834 N.E.2d 731, 733 (Ind. Ct. App. 2005). We accept as true the facts alleged in the complaint, as a Trial Rule 12(B)(6) motion to dismiss tests only the legal sufficiency of a claim. *Id*. A complaint may not be dismissed on the basis that it fails to state a claim upon which relief may be granted unless it appears to a certainty, on the face of such complaint, that the complaining party is not entitled to any relief. *Id*. We look at the complaint in the light

most favorable to the plaintiff, with every inference drawn in its favor, to determine if there is any set of allegations under which the plaintiff could be granted relief. *Id*. Indiana is a notice pleading jurisdiction in which a plaintiff need only plead the operative facts involved in the litigation by providing a clear and concise statement that will put the defendants on notice as to what has taken place and the theory that the plaintiff plans to pursue. *Godby v. Whitehead*, 837 N.E.2d 146, 149 (Ind. Ct. App. 2005), *trans. denied*.

In order to state a claim for an account stated, the plaintiff must allege that there is an agreement between the parties that all items on an account and the balance are correct, together with a promise, expressed or implied, to pay the balance. *B.E.I., Inc. v. Newcomer Lumber & Supply Co.*, 745 N.E.2d 233, 236 (Ind. Ct. App. 2001). Regarding the requirement of an agreement between the parties that all items on an account and the balance are correct, this Court has held that "[a]n agreement that the balance is correct may be inferred from delivery of the statement and the account debtor's failure to object to the amount of the statement within a reasonable amount of time." *Id*. (quoting *Auffenberg v. Bd. of Trs. of Columbus Reg'l Hosp.*, 646 N.E.2d 328, 331 (Ind. Ct. App. 1995)).

Arizona's First Amended Complaint alleges, in pertinent part:

> 2. That on or about August 24, 2004, [Arizona] presented [Appellants] with a statement of their account for payment, a copy of said statement is attached hereto and made a part hereof as Exhibit "A".[5]

[5] Appellants' statement was not actually attached to Arizona's First Amended Complaint. However, pages 4-11 of the statement were attached to Arizona's original complaint, and the entire statement was attached to Arizona's motion for summary judgment and Second Amended Complaint. As such, Appellants were well aware of the statement to which Arizona's First Amended Complaint refers.

3. That the attached statement was for product provided by [Arizona] and received by [Appellants].

4. That [Arizona] has made repeated [demands] for payment, however, the balance remains due and owing.

5. That no objections on said account have been received by [Arizona].

Appellants' App. p. 29-30. Arizona alleged that it had made repeated demands for payment, including the statement sent on August 24, 2004, and that Appellants never objected. This would generally be sufficient to state a claim that there was an agreement between the parties that all items on an account and the balance are correct. *See B.E.I., Inc.*, 646 N.E.2d at 331.

Nonetheless, Appellants contend that the period between August 24, 2004, the date of the statement, and September 9, 2004, the date on which Arizona filed suit, is not, as a matter of law, a reasonable amount of time within which to object to an account. If they did not have a reasonable amount of time in which to object, Appellants argue, no agreement that the balance is correct can be inferred. If the August 24, 2004, statement had been Arizona's only request for payment, Appellants might be correct. However, Appellants' statement shows that they began doing business with Arizona in May 2000, and Arizona alleged that it made *repeated* demands for payment with no objections from Appellants. If Arizona's allegations are true, which for purposes of a motion to dismiss we must accept them to be, *see Cripe, Inc.*, 834 N.E.2d at 733, then Appellants had a reasonable amount of time in which to object. Arizona's allegations are sufficient to state a claim that the parties had an agreement that the statement was accurate.

An account stated cause of action also requires a promise, express or implied, by the debtor to pay the balance. *Id*. Appellants argue that Arizona's First Amended Complaint fails to allege such a promise. We disagree. The complaint is sufficient to allege an implied promise to pay on Appellants' part. First, Arizona alleges that in the face of repeated demands for payment, Appellants never objected to the items or balance on their account. Second, the complaint alleges that Appellants received product from Arizona, and the statement shows that Appellants had made consistent payments for such product in the past. When combined with Appellants' failure to object to their statement, the fact that Appellants had made such payments in the past is sufficient to allege an implied promise to make future payments.

Because Arizona's First Amended Complaint was sufficient to put Appellants on notice as to what has taken place and the theory that Arizona planned to pursue, *see Godby*, 837 N.E.2d at 149, the trial court did not err in denying Appellants' motion to dismiss.

II. Request for Extension of Time

Appellants also argue that the trial court abused its discretion in refusing to grant their second request for an extension of time in which to respond to Arizona's motion for summary judgment. A decision on whether to alter the time limits on summary judgment is within the sound discretion of the trial court, and we will not reverse that decision unless it is against the logic and effect of the facts and circumstances before the trial court. *Farm Credit Servs. of Mid-America, FLCA v. Tucker*, 792 N.E.2d 565, 568 (Ind.

Ct. App. 2003). We conclude that the trial court acted within the bounds of its discretion in denying Appellants' second request for an extension of time.

Appellants' argument in this regard focuses on the fact that the trial court set a hearing on Appellants' motion to vacate the hearing on Arizona's motion for summary judgment on the same day set for the hearing on Arizona's motion for summary judgment. Appellants essentially argue that the reason they did not respond to Arizona's motion for summary judgment is that Appellants' motion to vacate the hearing on that motion was still pending and they did not know whether such a response would be required. Yet, the fact remains that Appellants' response was due on July 25, 2005, and the summary judgment hearing was set for August 10, 2005. Appellants accepted a substantial risk by failing to respond to Arizona's motion and apparently hoping that the trial court would grant Appellants' motion to vacate the hearing. In other words, given the possibility that the trial court would deny Appellants' motion (which it did), Appellants should have responded to Arizona's motion for summary judgment and been prepared to argue it on August 10, 2005. We cannot say that the trial court abused its discretion in refusing Appellants' request for an extension of time simply because Appellants were not prepared.[6]

III. Motion for Summary Judgment

[6] It is important to note that the trial court *did* grant Appellants one extension of time. Arizona filed its motion for summary judgment on May 18, 2005. Under Indiana Trial Rule 56(C), Appellants had thirty days, until June 17, 2005, to file a response. On June 3, 2005, Appellants asked for an enlargement of time in which to respond. The trial court granted Appellants' motion, giving them until July 25, 2005, to respond. We also observe that Appellants' request for a second extension of time was made on August 5, 2005, *after* the date their response to Arizona's motion for summary judgment was due. When a non-moving party fails to either respond to a motion for summary judgment or request an extension of time within the established time limits, the trial court lacks discretion to expand the time within which the non-moving party could respond. *See Markley Enters., Inc. v. Grover*, 716 N.E.2d 559, 563 (Ind. Ct. App. 1999).

Finally, Appellants argue that the trial court erred in granting summary judgment in favor of Arizona on its claim for an account stated. In the appellate review of a grant of summary judgment, we apply the same standard as the trial court. *Auto-Owners Ins. Co. v. Harvey*, 842 N.E.2d 1279, 1282 (Ind. 2006). Summary judgment "shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id*. (quoting Ind. Trial Rule 56(C)). During our review, all facts and reasonable inferences drawn from them are construed in favor of the non-moving party. *Id*.

Appellants assert that even though they failed to make any response to Arizona's motion for summary judgment, Arizona failed to satisfy its own burden of making a prima facie showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. As the Indiana Supreme Court recently stated:

> A party moving for summary judgment bears the initial burden of showing no genuine issue of material fact and the appropriateness of judgment as a matter of law. If the movant fails to make this prima facie showing, then summary judgment is precluded regardless of whether the non-movant designates facts and evidence in reponse to the movant's motion.

Monroe Guar. Ins. Co. v. Magwerks Corp., 829 N.E.2d 968, 975 (Ind. 2005). Stated differently, "[s]ummary judgment shall not be granted as of course because the opposing party fails to offer opposing affidavits or evidence, but the court shall make its determination from the evidentiary matter designated to the court." T.R. 56(C). We must determine, then, whether Arizona satisfied the initial burden of showing no genuine issue

of material fact and the appropriateness of judgment as a matter of law. We find that it did.

Again, an account stated is established by an agreement between the parties that all items on an account and the balance are correct, together with a promise, expressed or implied, to pay the balance. *B.E.I., Inc.*, 745 N.E.2d at 236. Also, "[a]n agreement that the balance is correct may be inferred from delivery of the statement and the account debtor's failure to object to the amount of the statement within a reasonable amount of time." *Id.*

We first address Appellants' claim that "Arizona has designated no evidence that [Appellants] either (1) agreed with the balance owed or (2) failed to object within a reasonable time." Appellants' Br. p. 18; *see also* Appellants' Br. p. 15 ("Arizona has not offered any evidence that [Appellants] failed to object to the account statement[.]"). As to Appellants' claim that Arizona failed to designate any evidence that Appellants agreed with the balance owed, we repeat that such an agreement may be inferred from delivery of the statement and the account debtor's failure to object to the amount of the statement within a reasonable amount of time. *B.E.I., Inc.*, 745 N.E.2d at 236. Here, Arizona did designate evidence showing that it insisted that Appellants pay their statement balance. *See* Appellants' App. p. 39. And while it is true that Arizona designated no evidence to prove Appellants' failure to object for purposes of summary judgment (although it alleged as much in its complaints), requiring proof of a negative fact creates an impossible burden that we refuse to impose. *See Milledge v. The Oaks*, 784 N.E.2d 926, 931 (Ind. 2003). In other words, when a plaintiff alleges that a defendant failed to object

to an account statement, the burden is on the defendant to come forward with evidence to show that he did object. Appellants failed to do so in this case. We will not reverse the trial court's grant of summary judgment based on Arizona's failure to designate evidence showing that Appellants *failed* to object.[7]

Alternatively, Appellants argue that "no such agreement to the amounts identified in the purported 'account statement' may be inferred, because [Appellants] objected within a reasonable time." Appellants' Br. p. 16. Appellants did send a letter to Arizona objecting to the statement, but this evidence was not designated to the trial court for purposes of summary judgment. On appeal, we consider only those matters that were designated to the trial court at the summary judgment stage. *Reed v. Beachy Constr. Corp.*, 781 N.E.2d 1145, 1148 (Ind. Ct. App. 2002), *trans. denied*. We also observe that the letter of objection was not sent until September 29, 2004, twenty days *after* Arizona had already filed suit, despite the fact that Appellants had maintained a balance with Arizona since July 11, 2002. *See* Appellants' App. p. 41-47. Therefore, even if this evidence had been designated, the trial court would not have erred in granting summary judgment.

Next, Appellants assert that "neither the Complaint nor the summary judgment motion alleges or designates any evidence to support the existence of a contract or agreement to pay money." *Id*. at 17. We disagree. The promise to pay that is required to

[7] Appellants also contend that "[a]s a matter of law, two (2) weeks cannot be deemed a 'reasonable time' for purposes of creating an inference of agreement under [an] 'account stated' theory, and the Complaint failed to state a valid claim for relief as a result." Appellants' Br. p. 16. This is simply a reiteration of Appellants' argument with regard to the trial court's denial of Appellants' motion to dismiss, which we rejected. We need not address it again with regard to Arizona's motion for summary judgment.

establish a claim for an account stated can be either express or implied. *B.E.I., Inc.*, 745 N.E.2d at 236. Here, Arizona designated as evidence a copy of Appellants' Customer History Report. This document shows that Appellants began receiving merchandise from Arizona in May 2000 and that Appellants made over ninety separate payments to Arizona for this merchandise between May 31, 2000, and July 13, 2004. In addition, Arizona designated the affidavit of its president and CEO, Korbacher. Korbacher alleged that Arizona "billed All Star Merchandise, Inc. monthly," that "All Star Merchandise, Inc. then paid all or part of the billings sent for the merchandise," and that "all credits for merchandise not received or unacceptable are listed on the Customer History Report." Appellants' App. p. 39. This evidence detailing the parties' prior dealings and Appellants' pattern of payments is sufficient to establish the existence of an implied promise on Appellants' part to pay its outstanding balance.

Finally, Appellants argue that "an 'account stated' theory cannot be supported against an individual or entity who is not identified in the purported 'account statement,' because the un-named individual or entity would have no obligation to object." Appellants' Br. p. 17. Appellants correctly note that the statement at the center of this litigation identifies only "All Star Sprint Merchandise" and Dan Lange as the customer. However, Arizona designated other evidence tending to prove the liability of the named corporate Appellants.

Specifically, Appellants, in response to a request for admission, admitted that Lange worked on their behalf. *See* Appellants' App. p. 35 ("Mr. Lang[e] was an agent of the Defendants[.]"). Furthermore, Korbacher swore in his affidavit that the statement in

question "indicat[es] the account of All Star Merchandise, Inc." *Id*. at 38. The designated evidence also shows that "All Star Merchandise, Inc." is an assumed business name of Webb Racing, Inc. *See id*. at 34 (response to interrogatory), 38 (affidavit of Korbacher). Finally, Korbacher's affidavit provides that Arizona received orders for merchandise from All Star Merchandise, Inc., prepared merchandise and sent it to All Star Merchandise, Inc., and billed All Star Merchandise, Inc. monthly, and that All Star Merchandise, Inc. then paid all or part of the billings sent for the merchandise. *See id*. at 39. In particular, Lange placed orders and wrote checks for payment "on the corporate checking account[.]" *Id*. at 38. The fact that none of the Appellants were listed by name on the statement in question does not preclude an account stated finding against them.[8] Arizona has designated sufficient evidence to satisfy its burden of making a prima facie showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law against All Star Merchandise, Inc. and Webb Racing, Inc.

The same cannot be said, however, for Arizona's claim against Webb personally. Indeed, the evidence designated by Arizona shows that any actions taken by Webb were taken on behalf of All Star Merchandise, Inc. and Webb Racing, Inc. Appellants' response to Arizona's "Request for Admission number 2" provides that "at all times relevant to this lawsuit, Guy Webb was an employee or owner of All Star Merchandise, Inc." *Id*. at 35. In addition, Korbacher's affidavit indicates that although Webb personally placed orders with Arizona, he wrote checks "on the corporate checking account." *Id*. at 38. Likewise, Korbacher averred that the statement in question

[8] Again, the statement identifies "All Star Sprint Merchandise" as the customer. "All Star Sprint Merchandise" is not a named defendant, but Appellants do not dispute that All Star Merchandise, Inc. is the actual customer.

"indicat[es] the account of All Star Merchandise, Inc." *Id.* Arizona has shown us no reason why we should "pierce the corporate veil" in this case.[9] Because there is no evidence that Webb conducted any business with Arizona in his personal capacity, we reverse the trial court's grant of summary judgment against Webb and remand this cause to the trial court with instructions to enter judgment in favor of Webb.[10]

Conclusion

The trial court did not err in denying Appellants' motion to dismiss Arizona's First Amended Complaint and did not abuse its discretion in denying Appellants' request for a second extension of time in which to respond to Arizona's motion for summary judgment. Furthermore, the trial court properly granted summary judgment against defendants All Star Merchandise, Inc. and Webb Racing, Inc. However, the trial court erred in granting summary judgment against Webb personally, and we remand this cause to the trial court with instructions to enter judgment in favor of Webb.

Affirmed in part, reversed in part, and remanded with instructions.

DARDEN, J., and RILEY, J., concur.

[9] "In general, the doctrine of 'piercing the corporate veil' holds individuals liable for corporate actions based on the failure to observe corporate formalities. The party seeking to pierce the corporate veil bears the burden of proving that the corporation is merely the instrumentality of another and that misuse of the corporate form constitutes a fraud or promotes injustice." *Fairfield Dev., Inc. v. Georgetown Woods Senior Apartments Ltd. P'ship*, 768 N.E.2d 463, 468 (Ind. Ct. App. 2002) (citations omitted), *trans. denied*.

[10] In its brief, Arizona contends, "If [Appellants] felt the judgment named an improper defendant, they should have answered the summary judgment pursuant to Trial Rule 56." Appellee's Br. p. 9. However, this disregards Arizona's own burden, stated above, of making a prima facie showing no genuine issue of material fact and the appropriateness of judgment as a matter of law as to Webb personally. *Monroe Guar.*, 829 N.E.2d at 975. Arizona has failed to make such a showing.